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Joint written statement* submitted by the Europe-Third World Centre (CETIM), Franciscans International, non-governmental organizations in General consultative status

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

[26 May 2014]

* This written statement is issued, unedited, in the language(s) received from the submitting non-governmental organization(s).

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The Tampakan Copper-Gold Project and Human Rights Violations in the South Cotabato, Philippines[1]

The Tampakan Copper-Gold Project is reportedly the 7th largest undeveloped copper mine in the world,[2] and when operational, it will be one of the largest copper-gold mines in Souteast Asia. Owned by Glencore-Xstrata, with the Australian company Indophil holding a minority stake, the mine is operated by a local subsidiary, Sagittarius Mines, Inc. (SMI). The final oeverall mine area is estimated at around 10,000 hectares (has.) falling within the boundaries of four provinces (South Cotabato, Sarangani, Davao del Sur and Sultan Kudarat), mostly forested and including a substantial portion in the ancestral domains of an indigenous people – the Bla'ans. The open pit of 500 has. would be dug to a depth of 785 meters while the topsoil stockpile would cover an area of 5 has. and the pit ore stockpile 49 has. The company's Environmental Impact Assessment[3] estimated that 5,000 people will be directly affected, most of these indigenous people, and will require re-settlement. The mining project will directly impact five watersheds, around 4,000 hectares of old-growth forest and five ancestral domains of an indigenous people.

Two separate reports, in 2007[4] and 2008,[5] cited the concerns of local stakeholders that the planned mining operation would lead to the pollution of the nearby downstream Lake Buluan and upstream Liguasan Marsh, damaging farmlands and fisheries and seriously impacting the food source for the wider Muslim and indigenous populations while destroying their livelihoods. This eventuality could lead to major social unrest. The 2008 report recommended that mining in the area be banned, considering the risk of pollution, erosion, siltation, and continuing devastating flash floods and landslides. The potential huge negative impact involving food insecurity, seismic geo-hazard and presence of armed conflicts was also cited. In both reports, the absence of *free, prior and informed consent* (FPIC) from the Bla'an people was considered a major issue as the basis for opposition, where FPIC is a legal requirement under the Indigenous Peoples Rights Act (IPRA).

The story of human rights violations in the Tampakan mining project started with the arrival of Western Mining Corporation (WMC), which got the original mining contract for Tampakan in 1995, in partnership with the locally-owned Tampakan Group of Companies (TGC)[6]. Since 1997, WMC has faced challenges to its operations starting with a Supreme Court case. In 2007, Xstrata[7] attempted to start the project. Systemic human rights violations have included displacement, lack of consultation, misinformation, threats and harassment and the failure to secure free, prior and informed consent (FPIC) from the Bla'an people. These were documented in a report submitted to the UN Special Rapporteur on Indigenous Peoples in 2002.[8] Also, in April 2012, a fact-finding mission conducted by the Tampakan Forum[9] established that: 1) Xstrata/SMI had clearly violated the Philippine government's order to refrain from

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[1] This declaration has been drafted in collaboration with Tampakan Forum-Philippines.

[2] Tampakan Copper-Gold Project Economic Benefits, http://www.smi.com.ph/EN/EnvironmentalImpactAssessment/English%20factsheets/Xstrata%20Tampakan%20EconomicBenefits%20Factsheet_web_V5.pdf, accessed May 2014.

[3] Tampakan Copper-Gold Project: Environmental Impact Assessment, SMI, May 2011

[4] Doyle, Wicks and Nally, "Mining in the Philippines – Concerns and Conflicts", Society of St. Columban, 2007, West Midlands, UK.

[5] Goodland and Wicks, "Philippines: Mining or Food?", Working Group on Mining in the Philippines, 2008, London, UK.

[6] WMC transferred this mining agreement to SMI in 2001. IndoPhil bought stakes in 2002. Xstrata gained controlling equity and management control of the Tampakan project in 2007.

[7] At that time, Glencore has not yet completed its take-over of Xstrata.

[8] SAC Marbel "A Report to the United Nation Special Rapporteur on Indigenous Peoples on Human Rights Violations Suffered by Bla'an Community of Bong Banwe Salnaong, Datal Blao, Columbio, Sultan Kudarat, Philippines", report submitted to the UN Special Rapporteur on IPs, 2002.

[9] Tampakan Forum is a coalition of local organizations in South Cotabato and national and international support groups providing technical and other forms of support to the campaign against the Tampakan Copper-

conducting any development activity in the project area while its application for an environmental clearance was still being appealed; 2) heightened presence of military and security forces in the area could be linked to the growing opposition of the Bla'an people to the mining project; 3) human rights violations were committed by the mining company when its road widening project destroyed crops, and farms and houses were burned; 4) at least four incidents of harassment perpetrated by police and military were documented in the first quarter of 2012; 5) freedom of movement was violated by the military imposed curfew in December 2011, and the military presence instilled a fear among Bla'ans of venturing into the forest to gather food and other essentials, as well as impeding the construction of huts or abodes[10]; 6) violation and disruption of cultural practices and religious beliefs.[11]

At least three incidents of extra-judicial killings are directly linked to the mining project. In August 2012, Juvy Capion and her two sons were killed by what military operatives described as an "armed encounter", but evidence points to it being the murder of unarmed civilians. In January 2013, Kitari Capion was killed by elements of a para-military group, on his way home while riding a motorcycle. In October 2013, the highest-ranking elder/leader among the Bla'ans, Anting Freay, was killed by military elements, again invoking a "military encounter". All the victims are families and relatives of Daguil Capion, the Bla'an chief entrusted with defending the ancestral lands, particularly against the entry of the Tampakan mining project. Daguil Capion has been wrongfully tagged as a communist insurgent by the military. The labeling of Bla'an community rights defenders as "insurgents" and "bandits" or criminals is one way that the state justifies the arrests and attacks on the community.

In June 2013, an independent Human Rights Impacts Assessment (HRIA)[12] reported five major drawbacks to the Tampakan mining project: 1. inconsistent information and lack of meaningful participation of the peoples concerned; 2. provision of basic services made dependent on the future of the project[13]; 3. imbalanced power relationship between SMI and affected communities; 4. insufficiency of established grievance mechanisms; and 5. accumulating grievances and triggers of violent conflict. The report also outlined the significant impacts of the mining project on human rights; linked the volatile peace and high-risk security situation to the mining project; noted the high level of marginalization and discrimination against indigenous peoples; and also noted the government failure to fulfill human rights duties.

These cases of harassment and killings have resulted in legal complaints and the filing of cases at the Commission on Human Rights of the Philippines (CHRP), the local courts and military tribunals. In all cases, military elements of Task Force KITACO were accused by survivors, and witnesses were named as perpetrators. Task Force KITACO is a composite group of police, military and civilian defense forces (a para-military group) and was set up as an "Investment Defense Force" (IDF) whose main mission is to protect the mining project. Subsequent Congressional investigations in the Tampakan case revealed that SMI was funding the operations and maintenance of Task Force KITACO.[14]

Gold Mining Project. The forum is convened by the Social Action Center – Marbel Diocese (SAC-Marbel) and secretariat function is provided by the Philippine Misereor Partneship, Inc. (PMPI).

[10]The Bla'ans construct their houses by getting materials from the forests. Since they are either prevented or fearful of entering the forests, they cannot construct, repair or improve their houses.

[11]Such as destruction of sacred burial grounds, intrusion into a place of worship to look for suspected criminals and prevention of the practice of customary beliefs because of military presence in the forests

[12]Hamm, Schax, Scheper: Human Rights Impact Assessment of the Tampakan Copper-Gold Project, 2013, Misereor (Germany) and Fastenopfer (Switzerland).

[13]Xstrata/SMI is fostering dependency among the Bla'ans by providing scholarships, medical supplies and personnel, road networks and livelihoods. These are functions and responsibilities of the local governments and the mining company is providing these services, with the promise that the continuation of such basic services can only be assured if the project is approved or supported by the community.

[14]Transcription of the Public Hearing of the Committee on National Cultural Communities, During the 3rd Regular Session of the House of Representatives of the 15th Congress of the Republic of the Philippines, Feb. 21, 2013, held at the South COtabato Gym and Cultural Center, Koronadal City, South Cotabato.

The Commission on Human Rights of the Philippines has conducted at least two high-level investigations and dialogues that have indirectly resulted in a temporary "re-positioning" of military personnel in the area.[15] This re-positioning, however, has not eliminated the fear and restriction of movement among the Bla'ans within their territories. And last February 2014, a military intrusion into the area resulted in an exchange of gunfire between the indigenous peoples and the military. No final resolution on the human rights violations has been issued by the CHRP in any of the mentioned cases. A court martial for the military personnel involved in the Capion massacre last August 2012 is slowly plodding on, with minimal participation of civil society organizations, community victims and survivors.

In December 2013, a conference of indigenous peoples produced a resolution against the Tampakan mining project, with more than 1,800 signatures and thumbprints of the Bla'ans, proving that there is widespread resistance to the project.[16]

In this petition, the Bla'ans declared that they are no longer interested in engaging in the FPIC process and demanded that a certification be issued accordingly by the National Commission on Indigenous Peoples.

Aside from the Bla'an people, opposition to the mining project includes the local irrigators' associations (farmers) and the National Agriculture and Fisheries Council (NAFC), the major multi-stakeholder mechanism of the Department of Agriculture.

To date, the impunity of Glencore-Xstrata/SMI is characterized by: 1. its insistence on continuing the negotiations on the proposed re-settlement with the affected Bla'an communities facilitated by the NCIP[17] program despite the legal opposition of the affected Bla'ans; 2. the deliberate effort to divide the Bla'an people with the bribery of scholarships and social development projects; and most recently installing "illegitimate" indigenous leaders and undermining the customary and traditional leaders; 3. its misleading public pronouncements that its security procedures in hiring para-military groups and Task Force KITACO were perfectly legal; 4. the awarding by the MICC to Glencore-Xstrata of an environmental award, despite its many violations; 5. the apparent need by Glencore-Xstrata/SMI of increased security, the major reason why a total military pullout in the area has not been implemented by the Philippine government.

The Philippine government attempted to institute policy reforms in the mining industry by means of Executive Order 79, issued August 2012. There was also an apparent intention to address the grievances of communities to be affected by the Tampakan mining project, but to date the provisions of the Executive Order have not been implemented.[18]

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[15]For the whole year of 2013, the number of military detachments inside the ancestral domains has been fluctuating between three and seven outposts, depending on the intensity of military operations. As of May 2014, only two military detachments remained.

[16]In January 2014, Bla'an representatives and the Social Action Center-Marbel Diocese (SAC Marbel) lobbied the Commission on Human Rights, the DENR-Mines and Geosciences Bureau (DENR-MGB) and the National Commission on Indigenous Peoples, submitting the signed petitions of the Bla'an. The next month, the group went back to Manila to lobby the Mining Industry Coordinating Council (MICC) not to endorse the continuation of the mining project. This time, the group led by SAC Marbel and the Social Action arm of the Catholic Bishops' Conference of the Philippines (CBCP-NASSA) brought with them boxes of petitions signed by more than 120,000 people from the provinces potentially covered by the mining project.

[17]National Commission on Indigenous Peoples – the government agency mandated to implement the national law for Indigenous Peoples or the Indigenous Peoples Rights Act (IPRA)

[18] Despite clear provisions in the Executive Order, the Philippine government has failed to 1. conduct a review of contracts and a performance evaluation of existing mining contracts and projects; 2. produce map overlays that distinctly identify the risks and vulnerabilities that mining-affected communities face; and 3. ensure that the Mining Industry Coordinating Council (MICC) is not used by influential political leaders as a venue to drum up support to the Tampakan mining project, as well as other controversial mining projects.

The mining company has failed to fully implement the provisions of the Environmental Clearance Certificate (ECC) issued by the Environment Management Bureau of the Department of Environment and Natural Resources (DENR).[19] Meanwhile, the local NCIP offices are facilitating the continued development activities of Glencore-Xstrata, specifically the negotiations for the re-settlement of the Bla'ans without their free, prior and informed consent, a move that is in direct violation of one of the ECC conditions.

A further issue is that the local government of the Province of South Cotabato has effectively legislated against the project by means of an ordinance called the Provincial Environment Code, which has a provision banning open-pit mining in the province of South Cotabato. The Department of Interior and Local Government (DILG) and the Department of Justice (DOJ) issued a letter on 18 September to the Provincial Government of South Cotabato, instructing them to review and revoke the existing local ordinance that bans open pit mining. This move by the executive branch is a direct attack on the autonomy of local governments, a policy embedded in the Philippine Constitution and the Local Government Code of 1991 (RA 7160)

It must be noted that these cases of human rights violations and the marginalization of the rural poor in mining-affected communities are a result of the continuing implementation of the flawed Philippine Mining Act of 1995 (RA 7962). Designed to liberalize the Philippine mining industry by encouraging increased foreign investments and facilitate the smoother entry and operation of foreign transnational corporations (TNCs), this mining law is in direct conflict with other national laws.[20]

As of May 2014, the Tampakan project was officially on "down-scaled status", after undergoing an 80% reduction in its programmed funds and staffing for 2014. It is not suspended nor abandoned. Glencore/Xstrata has indicated that they are pushing for their target for commercial operations in 2019. They have also committed themselves to pursuing completion of all their regulatory requirements, including securing consent from indigenous peoples and working on the local ban on open-pit mining.[21]

The Philippines prides itself in being a trend-setter and champion of some of the most progressive domestic laws and policies on the environment, human rights, sustainable development and indigenous people. However, genuine and effective enforcement of these progressive laws is lacking. The Tampakan case proves that a giant TNC like Glencore-Xstrata can violate national and local laws, and commit human rights violations, with complete impunity. This is why, in case of failure at the national level, an appeal mechanism based on binding norms is needed at the international level. The current modes and mechanisms of soft laws and voluntary guidelines are inadequate to address human rights issues and concerns in the extractive industries in general.

Such legally-binding norms should in particular include provisions ensuring that TNCs are not allowed to take advantage of State armed or security forces or hire private militia and thst extractive activities are not allowed in areas of conflict. It should also include provisions on the extra-territorial obligations of states regarding human rights violations committed in other countries by TNCs having their headquarters within their territories as well as on the need for TNCs to respect and comply with domestic policies and national laws. The international instrument should also provide for a complaint and enforcement mechanism as well as a mechanism to monitor, analyze and research TNCs activities and their impacts o human rights.

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[19]Three conditions are stipulated in the certificate: 1. securing the free, prior and informed consent (FPIC) of the Bla'an people; 2. the social acceptability of the mining project reflected in the approval of all *sanggunians* (local legislative councils); and 3. perpetual liability for environmental damages resulting directly or indirectly from project operations.

[20]In particular, those that promote environmental conservation (NIPAS or RA 7586), respect the indigenous peoples (IPRA RA 8371), encourage local autonomy and decentralization (LGC or RA 7160), agricultural modernization (AFMA or RA 8435), address climate change (CCA or RA 9729) and appropriate disaster risk reduction and disaster-response (DRR 10121).

[21]While SMI and IndoPhil have put out contradicting media statements at various times in the last four months (either that Glencore is considering a divestment option in Tampakan or that Glencore is still committed to the project), Glencore/Xstrata itself has not made any public declaration on its plans for Tampakan.

The Europe-Third World Center (CETIM) and Franciscans International call on the government of the Philippines to ensure a demilitarization of the ancestral domains and the surrounds of the mining area; to issue a certification from the National Commission on Indigenous Peoples (NCIP) that no further steps will be undertaken regarding free prior and informed consent process, given that the Bla'an people have already expressed their opposition to the project in their petition; to respect the local autonomy of the Province of South Cotabato and the Provincial Environment Code; to conduct a high-level Peace Dialogue with the Bla'an people to de-escalate the conflict situation in the area; and to revoke the Environmental Clearance Certificate, given the lack of social acceptability

The CETIM and Franciscans International also request the Special Rapporteur on the Rights of Indigenous Peoples, the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions and the Independent Expert on Human Rights and the Environment to closely monitor this case and carry out visits to the country.

The CETIM and Franciscans International also call on the Human Rights Council to create an intergovernmental working group with the mandate of developing an instrument to control the activites of TNCS and their impacts on human rights, and provide access to justice for the victims of their activities.